WATER MANAGEMENT IN THE YUKON TERRITORY
INTEGRATION WITH LAND USE PLANNING

by

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Westwater Research Centre
The University of British Columbia

March 1984

YUKON RIVER BASIN STUDY

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I. Background

Introduction

An agreement dated September 9, 1983, to be signed by the Government of Canada, the Government of the Yukon Territory and the Council for Yukon Indians, will introduce a Land Use Planning Process into the Yukon for the purpose of providing "a framework for guiding decisions relating to the conservation, development, management and use of land, including inland waters and the offshore, and resources, in relation to desired goals, priorities and objectives (cl. 1.1)." This study examines the requirements of an effective water management regime and examines how water planning can best be undertaken in the context of an overall land use planning process in the Yukon Territory.

The Importance of the Yukon River Basin

The Yukon River, together with its source lakes (Atlin, Bennett, Tagish, Marsh, Laberge) and its many tributaries in Canada (Atlin River, Fortymile, Pelly River, Stewart River, White River) comprises by far the most important water resource in the Yukon Territory. It is the focus of an intergovernmental Yukon Water Basin Study [1] as well as the focus of this study.

The governments involved in the basin study, as well as Canada, are British Columbia and the Yukon Territory, the two regions in Canada that share the Yukon River basin. The river eventually flows into the State of Alaska so that the state government as well as the government of the United States must be added to complete the list of national and regional governments involved in the total Yukon watershed.

Water resources play an even more fundamental role in a relatively undeveloped region like the Yukon Territory than they do in a fully developed region.

The initial role of the Yukon River as the main transportation link to the gold fields of the Klondike lapsed when the Alaska Highway was built during the Second World War, but river transportation is still important in the recreation and tourism sector of the Yukon economy (the no. 1 industry when mining is down). The river is home to major stocks of salmon as well as to abundant stocks of fresh water fish. It also provides the habitat needs of terrestrial species of wildlife. Its tributaries are essential for the process requirements of the mining industry. One segment of the industry, placer mining, takes its wealth directly from the banks and beds of streams.

In addition to existing hydroelectric generation facilities on the Yukon River near Whitehorse, there are major, undeveloped hydro electric sites on both the mainstem and the tributaries. Possibly of greatest importance, human settlement, both traditional

and modern, has found the most liveable regions in the Yukon Territory to be along the shores of lakes, rivers and streams. Communities need the water amenities as much as they rely on the waters for drinking purposes and for waste disposal. There is no doubt that the water resource is preeminent among all natural resources in terms of the needs and interests of the people of the Yukon Territory.

The Rationale for Water Management

A list of water resource uses would feature:

- water supply for consumptive use
- effluent disposal and pollution control
- recreational and amenity use
- transportation use
- use by organisms other than, but important to man
- land drainage and flood control
- irrigation for agriculture
- hydroelectric power generation

Some of these uses require preservation of water resources in their present, pristine condition; others imply impounding, diversion or alteration in water quality. All require comprehensive management if conflicting users are to be regulated so as to provide optimum benefits for the people of the Yukon Territory in particular, and for all Canadians in general.

In the nature of flowing water, conflicts are generated between upstream and downstream users as well as at the location of the water use. In the case of the Yukon River, these conflicts may cross the international boundary between Canada and the United States as well as the boundary between the Yukon Territory and British Columbia. Consequently, the water resource has a spatial dimension that creates important complications for a management system. These must be recognized and dealt with in attempts to integrate water planning into a land use planning process.

Water Management Problems in the Yukon

From the nature of water use conflicts it follows that institutional arrangements must protect existing uses, allocate rights to impound, divert and use water for new purposes, and regulate activities that degrade the quality of water. Decisions about these matters should serve explicit policies aimed at maximizing the overall social benefits to be realized from the water resource. Consequently, the institutions must deal with planning, assigning priorities among differing water uses, allocating rights to use water and regulating the conduct of water users.

To date there has been little planning of water use in the Yukon Territory, and there is no explicit assignment of priorities among differing water uses. The current system responds in an ad hoc way to demands for water use as they arise. Hence, as new mines such as Cyprus-Anvil come into production, bringing new communities in their wake, the water needs of these developments

have been licensed. The Northern Canada Power Commission makes its future hydroelectric generation plans known with explicit claims on dam and reservoir sites. Placer mining entails the use of water both for hydraulic purposes and to carry off sediments, and these demands arise randomly as miners move their operations into newly promising areas.

In large measure, the failure to plan and to formulate priorities can be attributed to lack of competition among water resource users. The Yukon River basin is Canada's third largest watershed. The Yukon Territory has, along with the Northwest Territories, by far the lowest population density in Canada. The region is undeveloped. The water resource is under-utilized.

But water use conflicts have been surfacing in recent years. The placer mining industry is being confronted with new draft guidelines proposed by the federal Department of Fisheries and Oceans to protect fish habitat and particularly the spawning beds of Pacific salmon. The Northern Canada Power Commission was facing stiff opposition when it was pressing forward with its Mid-Yukon hydroelectric project. Water quality issues surrounding Whitehorse's municipal waste disposal into the Yukon river have been argued for many years, but in March, 1983, the publication of Guidelines for Municipal Wastewater Discharges in the Yukon Territory indicated that water authorities were finally taking a firm stand.

While no priorities among differing water uses have been explicitly formulated as yet, there is concern that inaction

entrenches implicit priorities, and that these priorities favour future development uses of water over existing conservation uses. Hence, a pervasive source of conflict is the advocacy by organizations like the Yukon Conservation Society for preservation of much of the Yukon watershed in its pristine condition. A related concern is the interest of native peoples, expressed through the Council for Yukon Indians, in maintaining the Yukon River and its tributaries in a condition that will support traditional hunting, trapping and fishing as well as the needs of native communities for uncontaminated water supplies.

Under existing institutional arrangements, these issues are being dealt with in a variety of ways. Native concerns are being addressed through negotiations for a land claim settlement. Regulation of placer mining has been the subject of a federally-appointed inquiry (the Christensen Inquiry) which held public hearings through the summer of 1983 and reported in December of that year (Resources, Regulations and Reality: Report of the Yukon Placer Mining Guidelines Public Review Committee, December, 1983). The question of future energy development in the Yukon Territory and its implications for the Yukon River are under study before a number of government agencies, with a recent report by the National Energy Board recommending that a new federal agency (likely the NEB, itself) be given authority to determine energy investment, facilities and consumer rates.

At the same time, individual applications for water licences are made by communities, by operators of new tourist developments

or by mining and petroleum companies, and each of these is dealt with by the Yukon Water Board on its own merits without regard to any overall plan.

The Nature of the Planning Process

Natural resource use planning is not necessarily the production of a physical scheme or "master plan" that defines where and when certain activities can occur. Rather, planning is better viewed as a process that defines goals and criteria by which alternative courses of action can be weighed and resource use proposals can be assessed. Richardson defines land use planning as:

> "an orderly process for making decisions about the location of undertakings and activities on the land and for solving competing demands for the use of land and resources, based on predetermined policies and objectives."[2]

It is also a process that allows goals and actions to be perodically re-assessed and changed when necessary. The planning process itself must also be reviewed from time to time to ensure that it is achieving its goals of providing comprehensive and fair representation of interests and efficient decision-making.

Planning for water use management is discussed in this paper in this process context rather than in a plan-oriented one. A first phase of this process (Phase I) involves several functions which collectively amount to identifying and gathering the information needed to formulate overall goals for water management in the planning area. For instance, one function is determining workable water planning areas that ideally would be common or at

least coordinate with areas to be used in land use planning. A second function consists of recording the uses to which the water resources are now put and seeking out planned or potential future uses.

Phase II of the process consists of analyzing the information brought together in Phase I for the purpose of determining the objectives and decision criteria to be applied. Included in this phase would be determining what are the potential impacts of each use on others, and, where necessary, the means of mitigating or compensating for these impacts. An important purpose of this phase is to reveal resource use conflicts and means of resolving them so that disputes are minimized at the earliest stage possible. In Phase III specific resource use proposals are assessed and approved, modified or rejected according to the goals, objectives and criteria determined in the first two phases.

Due to the rapidly changing nature of northern society and its needs and values, each phase must have a 'recycling' function. Goals and criteria must be continually re-assessed and new data must be continually generated so that the planning process can keep up with and reflect societal changes.

II. Existing Water Management Institutions

Generally, because the natural resources in the Yukon Territory, including water resources, continue to be owned and managed by the Government of Canada, it is federal legislation that determines the institutional structure and the regulatory and management responsibilities of various government departments and agencies. The following summary is based on the companion study entitled Legal and Administrative Arrangements for Yukon River Basin Water Management

Federal legislation

The Canada Water Act provides for the development and implementation of water management and water quality management plans for river basins by appropriate intergovernmental agencies. These plans would often be based on interjurisdictional agreements, as many basins, such as the Yukon River, extend over provincial, territorial and even international boundaries. While several joint studies have been undertaken (the Yukon River Basin Study is one example) and one joint management plan (the Okanagan Basin Study) established, no continuing coordinated basin management has as yet developed under the Act. Were policy changed to encourage use of the water management provisions of the Canada Water Act there could be comprehensive, integrated planning and management of the Yukon River Basin including all of the federal, provincial and territorial governments involved in the Basin.

The Navigable Waters Protection Act regulates obstruction and diversion of navigable rivers such as the Yukon, generally prohibiting such activities unless a permit is first obtained. Applicants for permits must submit plans to the Ministry of Transport and comply with requirements for the protection of navigation on waterways. The Fisheries Act is the primary federal statute related to water quality in all Canadian waters. Its explicit goal is to prohibit physical interference with fish and their habitat; in pursuit of this goal it incidentally achieves the broader goal of general pollution control. Its formal instrument for achieving pollution control is criminal law enforcement of the offences specified in the Act. Informally, through referral procedures, the Department of Fisheries and Oceans reviews development applications and makes its requirements known to developers and other government agencies.

The main piece of legislation dealing with general water management north of 60° is the Northern Inland Water Act (NIWA). Under this Act, ownership of water resources in both territories is vested in the federal Crown. (In addition, the Territorial Lands Act reserves to the federal Crown all river and lake beds as well as a strip of land 100 feet wide along all coastlines and along the banks of all navigable lakes, rivers and streams). The federal Department of Indian Affairs and Northern Development (DIAND) administers the Act. In addition, the Act establishes a Water Board in each territory. This Water board is made up of not less than three and not more than nine members appointed by the Minister of DIAND. There must be at least one nominee of each of the

departments of the Government of Canada, that, in the opinion of the Cabinet, are most directly concerned with management of the water resources of a territory, and at least three persons named by the Commissioner-in-Council of the territory.

The Water Board has as its mandate to "provide for the conservation, development and utilization of the water resources . . . in a manner that will provide optimum benefit therefrom for all Canadians and for the residents of the Yukon Territory in particular" (Section 9, NIWA). In practice, the NIWA authorizes the Water Board to carry out this mandate by issuing licences for water use and waste disposal, on the approval of the Minister of DIAND. Public hearings are normally held prior to the issue of such licences.

The Water Board also has the power to make recommendations to the Minister regarding any matter in which the Cabinet is authorized by the Act to make regulations. Sections 26 and 27 authorize regulations respecting:

- the establishment of water management areas;
- the establishment of priorities of water use;
- the provision of water quality standards;
- the establishment of land reserves to protect water resources;
- the suspension of licensing in an area to enable comprehensive evaluation and planning to be carried out; and
- general implementation of the purposes and provisions of the Act.

The Board may also conduct public hearings regarding the nature of these regulations. So far, water management areas have been established under these regulations, one being the Yukon River and its tributaries, but as yet, water use priorities and general water quality standards have not been developed; nor have land reserves ever been designated for the purpose of protecting water resources or have water resources been withdrawn from licensing.

The licensing system administered by the Yukon Territorial Water Board is described in detail in the companion study of Legal and Administrative Arrangements for Yukon River Basin Water Management. Of note here is the fact that a recent court decision (Yukon Conservation Society v. Yukon Water Board, 11 CELR 99, Fed. Ct.) established that the Board is a quasi-judicial body, and therefore subject to legal rules of fairness and absence of bias when dealing with licence applications. As a result, the Yukon Water Board has recently revamped rules of procedure when seeking information and advice so as to eliminate Board participation in any closed meetings concerning a licence once an application has been filed.

A second significant point regarding the Board's licensing practice is that it includes control over qualitative as well as quantitative aspects of water allocation. The Board may set terms and conditions within licences stating such parameters as the maximum amount of chemical or biological impurities a water user may discharge into a water body. As yet, no general standards have been adopted under the NIWA Regulations for setting such conditions, but, as previously mentioned, the Board can make recommendations to

the Minister regarding such standards. The Board has recently passed guidelines for municipal wastewater discharges in the territory.

This dual authority, although not exclusive since the Board's water quality conditions can be overridden by regulations established under the Canada Water Act or the Fisheries Act, is rather unique in Canada in that rarely is the control of both qualitative and quantitative aspects of water use vested in one body. By comparison, in British Columbia water allocation is determined under the B.C. Water Act whereas water quality is regulated under the Waste Management Act. Present policy in the province's Ministry of Environment is that objectives for both water allocation and ambient water quality are established by the Water Management Branch; the Waste Management Branch regulates permits in order to maintain water quality at or above the established objectives. Hence, water allocation and water quality are jointly considered by one body in a policy sense, but B.C. legislation and regulations do not explicitly combine the licensing functions as is the case with the Yukon Water Board.

British Columbia Legislation

In British Columbia, the major water management legislation is the Water Act. It is administered by the Comptroller of Water Rights, an official of the Water Management Branch of the Ministry of the Environment. His functions consist of assessing applications for licences against the statutory criteria provided in the Act, and then accepting or rejecting these applications as appropriate. Public hearings are required in certain cases. The

Act also provides for the monitoring and supervision of licensed uses, but does not deal with water quality. This aspect is covered by the Waste Management Act, under which permits are granted for waste discharge by the Waste Management Branch of the Ministry of Environment, according to water quality guidelines established for the different major industries in the province. The subject of water planning can be addressed in an overall resource planning sense under the provisions of the Environment Management Act. Under this Act the province has initiated a strategic resource use planning system based on watershed units.

International Obligations

When dealing with water management affecting Alaska, the International Boundary Waters Treaty is the major mechanism for solving issues arising between Canada and the United States. The treaty reserves to each country the right to use and divert waters in its territory as it wishes, but subject to the qualification that downstream transboundary users who are injured by upstream interference or diversion are entitled to the same legal remedies as if the injury occurred in the country where the interference took place. The Treaty also creates the International Joint Commission, comprised of six members, three appointed by each country, which, at the direction of the signatory states, investigates and if necessary adjudicates border water disputes.

Fisheries treaties between Canada and the United States could also affect the Yukon River basin because substantial stocks of salmon caught in Alaska waters are spawned and reared within the Yukon Territory. Finally, there are guaranteed rights of navigation on the river.

Overall, then, a number of statutory powers and administrative systems are available within the existing institutional structure to enable comprehensive water planning and management to take place.

III. Land Use Planning Initiative

In General

While it has been possible, and even beneficial, to avoid the expense of comprehensive planning and water management in the past, it is now recognized that random responses to water use conflicts are no longer adequate. The water resource has not been singled out for this neglect of a comprehensive policy. Indeed, it has been an almost universal complaint in recent years that there is a lack of northern policies that could translate into integrated resource management, not in the sense of a "master plan" but in the sense of an ongoing planning process. The Beaufort Sea Task force, for example, stated the problem as follows:

> No regional development framework exists at present; thus, industrial projects cannot be viewed in a long-term, cumulative and comprehensive context so as to maximize regional and local socio-economic benefits and minimize environmental impacts; the lack of such a planning framework could preclude future resource use options. Coupled with this is the lack of a focussed forum within which conflicting interests may be openly debated and balanced; the interests of all those affected must be considered in the decision-making process.[3]

The deficiencies are seen with respect to virtually all activities of governments in both northern territories. Much effort is now being expended to remedy these deficiencies. Land claims settlements, which are now nearing completion (terms of settlement have been reached in the Yukon) will anchor one major component of a comprehensive resource management policy. Resolution of conflict between the Government of the Yukon Territory and the Government of Canada over the extent of land control that will be transferred to the Territory will define another. Overarching these will be a new land use planning process.

The Federal Proposal

In 1980, in response to widespread criticism about the lack of planning to deal with burgeoning industrial activity, the federal government initiated the formulation of a land use planning policy for the North, to be developed by the Department of Indian Affairs and Northern Development (DIAND). After several preliminary papers, DIAND released its draft proposal "Land Use Planning in Northern Canada" in October 1982. The Department's intention was to receive public commentary and then to have a final planning process, based on this proposal, in place by February 1983.

This draft proposal was not favourably received because it was perceived as not fulfilling the overall goals of land use planning. Instead, there was concern that DIAND was more interested in placating government critics and facilitating northern development than in establishing a bona fide planning framework. The territorial governments were particularly irritated

by DIAND's failure to consult with northern representatives throughout the formulation of the draft policy. As well, they disagreed with the continuation of exclusive federal control over planning decisions that was indicated in the draft.

Action in the Yukon Territory

In the Yukon Territory, a document entitled "Land - A Yukon Resource" was released in April 1982, to present the territorial government's view of the role of a planning process.[4] It emphasized the need to facilitate the use and ownership of land by Yukoners, and argued that a planning process should provide for "the transfer of land from federal to territorial jurisdiction as land use plans are adopted." By comparison, DIAND's October draft made no mention of providing a mechanism for land transfers. Instead, the federal government emphasized the need to settle Indian land claims in the territory before contemplating the transfer of control over any lands from the federal to the territorial government.[5]

In apparent repudiation of this federal policy, the Yukon legislature enacted its own land use planning policy in the Yukon Land Planning and Development Act, assented to in December 1982. The Act's wording covers all land in the Territory and not just the 0.2% now under territorial control. For this reason it might be disallowed by Ottawa as being beyond the jurisdiction of the territorial legislature. However, the Act has not yet been proclaimed to be in force. It can be seen as a political strategy on the part of the Yukon government to provoke the federal

government into faster action on land planning as well as to assert the territorial government's expectation of greater control over land and resources in the future.

The Council for Yukon Indians

The Council for Yukon Indians has also been involved in the northern land use planning initiative. In a discussion paper released in August 1982,[6] the Council voiced objections to the centralized approach to planning indicated in the federal proposals. It endorsed the eventual transfer of land to territorial ownership, but only after final agreement regarding Indian land claims, which would include land transfers to Indian ownership, and the establishment of the planning process. The paper outlines a proposed planning structure which would guarantee at least 25% Yukon Indian representation in key planning groups. Whether Indian and non-Indian lands would be subject to a common planning process, or whether planning for Indian-owned lands would be conducted independently by an all-Indian administration, was not made clear. Nevertheless, it would appear that the Council views land use planning as a means of protecting Indian lands as well as of having a strong voice in the use of non-Indian lands.

Cooperative Endeavours

Since widespread rejection of DIAND's October 1982 draft, attempts have been underway between the federal and territorial governments to cooperatively design a planning policy and process.

Basic principles for determining how planning should take place have been under negotiation independently in each territory since the beginning of 1983.

In the Northwest Territories, representation in this negotiation process was eventually broadened by including members from four major aboriginal organizations. Planning principles collectively proposed by these four groups, which contained some significant departures from federal-territorial principles in terms of the priority placed on local interests and involvement, were eventually adopted in the draft agreement negotiated by these parties (the latest draft is dated July 28, 1983).

In the Yukon Territory the negotiation of basic principles has taken place primarily between federal and territorial government representatives with later involvement of the Council for Yukon Indians, though the Yukon government maintains that it represents the interests of all Yukoners, including natives, and that the participation of the Council for Yukon Indians in the negotiations is not as a party on equal footing with the government. By September 9, 1983, the negotiations culminated in a final draft of an "Agreement on Land Use Planning - Yukon Territory." This agreement sets out general principles that will underlie land use planning in the Yukon, proposes an administrative structure, and designates the planning roles and functions of each level of government. It states that the role of the Council for Yukon Indians will be defined in the Agreements-in-Principle which will settle their land claims.

Looking at the guiding principles stated in the agreement, it is noteworthy that emphasis is placed on the interests and well-being of Yukon residents, with national and regional interests playing a secondary role. The principles also assert the importance of "active and informed participation and support of the people and communities affected at all stages of the process." Finally, it is acknowledged in the principles that land use planning must be related to other planning processes and regulatory activities, and will include planning not just for terrestrial resources but also for inland waters and offshore areas.

The Land Use Planning Process

The organization of the planning process is indicated in Figure 1 (flow chart). While this planning structure is relatively detailed in terms of defining and designating authority and responsibilities, it leaves many important matters to be determined in the future as the process is implemented.

At the top, the federal DIAND minister and the territorial Renewable Resources minister share equal authority, a marked departure from past practices when territorial officials have always played subordinate roles. Actual plans are to be developed by interdisciplinary Planning Teams under the direction of the Director of Planning who is answerable to the Land Use Planning Commission. These plans will then be reviewed by both the Commission and the Advisory Committee of senior government officials. The Advisory Committee, as well as advising the Ministers on planning policies, goals, objectives and priorities,

will be responsible for ensuring that plans are implemented by the different departments of government in an effective, timely and coordinated manner. It is not clear how linkage between these two bodies, the Land Use Planning Commision and the Advisory Committee, is to be accomplished. There is only an indirect connection through the requirement that each functions by advising the Ministers.

This arrangement will place an onus on the Ministers to absorb, assess and reconcile what may be often contradictory advice generated by these two groups. The Advisory Committee and Land Use Planning Commission have very different compositions (senior bureaucrats in the former case, members of the public in the latter); consequently, each group may differ strongly respecting the interests to be represented and the planning goals and priorities that should prevail. Having one government and one citizen group in the system should provide a check on the degree to which planning is dominated either by bureaucratic interests or by local or regional interests. How well these interests are balanced will depend in large measure on whether the personalities and strengths of the members of the Land Use Planning Commission can match the knowledge and power of the bureaucracies.

Two other provisions of the agreement require comment. First, the agreement states that planning "will be based on current authorities and responsibilities for land and resources," thereby acknowledging that existing mandates of the respective government departments and agencies of both levels of government will be

respected in the implementation process. However there is recognition that land transfers will be made from the federal to the territorial government to meet the "legitimate requirements" of the latter. Second, the agreement invites consideration in the future of planning legislation to give the process a firm legal basis, but acknowledges that the "as yet undefined expression of the planning process makes current consideration of effective legislation difficult."

IV. Integration of Water and Land Use Planning

Introduction

The integrated nature of land and water resources -- the fact that activities associated with one inevitably have impacts on the other -- dictates coordinated and comprehensive management and planning. However, to date, there has been little explicit attempt to integrate water and land use management in the north. Land and water use allocation and regulation presently operate within different administrative regimes, with communication between them occurring only through informal technical advisory committees. Developers usually must apply for permits under the Land Use Regulations as well as for water use authorizations or licences, and the regulatory reviews that ensue are conducted, for all intents and purposes, quite independently.

With respect to planning, the northern land use planning process now being formulated is the first indication that land and resource planning may occur in an explicit and organized fashion.

Notably, the September draft agreement explicitly includes water resources, stating that land use planning "will provide for the conservation, development and utilization of land, resources, inland waters and the offshore," but as yet, how the planning process will incorporate water uses is undetermined. Some options for consideration are dealt with in this chapter.

The Primary Actors in Northern Planning

In its role as administrator of federal lands and resources and as coordinator of federal activities in the north, DIAND has the dominant part to play in northern resource planning and management. In terms of water, however, the Parliament of Canada entrusted many important planning-related management functions to the Yukon Water Board. Several members in DIAND argue that the Board's role is strictly an allocative one, but as Chapter II revealed, many of the provisions of the Northern Inland Waters Act contemplate that the Board should play a major role in water planning activities. For instance, water management areas have already been established under NIWA, and the Board has the power to make recommendations to the Minister to establish new ones. These could provide the basis for regional water planning. The Board can also advise on water quality standards or water use priorities. For all these purposes it can hold public hearings. These hearings can also deal with any other planning-related issues, such as defining appropriate conservation uses or withdrawing land from disposition and suspending licence allocation until appropriate policies and plans are established for an area. Overall, the

various parts of the Act could, if used in concert, provide for significant involvement by the Board in water planning.

It has been argued that the quasi-judicial status of the Board precludes it from being involved in planning, in that such involvement might bias future allocative and regulatory decisions. However, the legal rules pertaining to a quasi-judicial status do not necessarily preclude the Water Board from exercising planning functions, provided that care is taken to keep these functions separate from regulatory proceedings. Furthermore, since these planning-oriented functions are allocated to the Board by legislation, the courts are obliged to reconcile the Board's regulatory and planning roles. There is ample precedent for such reconciliation. For example, the National Energy Board operates under quasi-judicial rules; yet it carries out such planning functions as holding public hearings to estimate future energy supply and demand and to determine the preferred means of delivering energy to different regions of the country.

A third actor in planning in the Yukon is the territorial government. Under the Yukon Act the territorial legislature may make laws for the "preservation of game"; how water is used holds strong implications for the protection and harvesting of wildlife. The responsibilities of the territorial government for wildlife management are recognized in the Yukon Wildlife Ordinance which is administered by the Department of Renewable Resources.

The Council for Yukon Indians also has a stake in water planning in the Yukon. Not only is it a signatory to the draft land use planning agreement. In addition, water rights on the Indian lands that are to be designated under the Yukon land claim agreement are not given any special status and therefore will remain subject to allocation and regulation under the Northern Inland Waters Act. Therefore, the Indian people will be highly dependent on their involvement in the land use planning process to voice concerns and to influence decisions affecting water resources on their own lands as well as throughout the Territory.

A special interest in the Yukon River Basin is its potential for the generation of hydro-electric power. The Northern Canada Power Commission, which is responsible for providing the power needs of the Territory, will wish to assert a strong voice in the planning process to ensure that potential future hydro-electric power sites are recognized.

Finally, the federal departments of Fisheries and Oceans, Environment, and Transport, due to their legislative mandates in relation to water resources (fisheries, pollution and navigation), have stakes in the planning process. The regulatory systems that they administer will have to be considered in the formulation of plans, as well as coordinated with the planning process.

Notwithstanding the numerous actors, the two most significant regimes affecting future water use planning are the proposed land use planning process and the present water allocation and regulation system. The onus, therefore, is on DIAND and the Water Board to develop means by which planning and licensing can work in a coordinated manner.

Current Water Management Roles

As mentioned previously, the Yukon Water Board's main activity in carrying out its mandate to "conserve, develop and utilize" the water resources of the territory is to issue water licences. All water uses, except domestic uses by riparian owners and temporary emergency uses for such purposes as firefighting and flood control, cannot legally occur without a licence under s.10 of the NIWA, unless they fall within the excepted categories set forth in s. 11 of the NIWA Regulations. Applications for water use are dealt with by the Water Resources Division of the regional DIAND office, which forwards copies to the Water Board. Formerly, under s.11 of the NIWA Regulations, if the proposed use was for municipal purposes by an unincorporated settlement or was for water engineering purposes, or would continue for less than 270 days, or would use less than 50,000 gallons per day, the Controller could issue an authorization in lieu of a licence, provided that the application met the requirements specified in s.10(1) of the Act.[7] In all other cases, the water user had to acquire a licence issued by the Water Board itself. However, in The Dene Nation v. The Queen (Federal Court of Canada, Feb. 14, 1984, not yet reported) it was held that this authorization system amounted to an illegal delegation to the Controller of the discretionary powers conferred on the Board by NIWA. Consequently, a new s.11 of the NIWA Regulations was enacted repealing the old and declaring that municipal uses by an unincorporated settlement or a construction camp, water engineering uses or uses not exceeding 50,000 gallons per day would henceforth be exempt from licensing requirements.

In reviewing licence applications, the Board organizes public hearings where it hears presentations from the applicant, concerned groups and private citizens. The Board takes the information and opinions presented into consideration when drafting the terms and conditions of the licence. The Minister, on the advice of his staff in Ottawa, can accept or reject the draft licence in whole, but cannot modify it. If he rejects the draft licence, the board may review and modify it, holding further public hearings if necessary. Upon acceptance by the Minister, the licence becomes valid and the applicant may use the water resource according to its terms and conditions.

DIAND, through its Water Resources Division in the Renewable Resource Branch, is responsible for the federal government's water resource administration. The Division also plays a technical support role to the Board's licensing activities, providing it with data and advice regarding, for instance, the detailed provisions of the terms and conditions of licences. The regional office of the Division also provides the enforcement capacity to monitor and report on licensees' adherence to the provisions of their licences.

Lead Role in Planning: Water Board or DIAND?

Apart from the recurring dispute over the legal foundation of the authorization process [8], the roles of DIAND and the Water Board in licensing are fairly well established. This cannot be said when it comes to planning for water use and water management.

Several factors that support a water planning role for the Water Board have already been discussed. In this role it is obviously desirable that the Board continue to have the technical support of DIAND's Water Resources Division and that the Division continue to carry out its enforcement functions. In addition, the Division claims that its role includes policy development. Is there a further role that the Division should play? Specifically, should it, instead of the Board, be the designated body that contributes water management planning to land use planning?

In our view there are important factors suggesting that this is not the appropriate role for the Division. The land use planning process is being established as an open process intended to give regional concerns a high priority whereas the Water Resources Division operates in the less open fashion of the bureaucracy and represents the federal and national viewpoints rather than regional ones. Personnel of the Division should be involved in a technical capacity through the Planning office or the Intergovernmental Coordinating Committee to be established under the land use planning process but, if this were the sole extent to which water use and management interests are recognized in the land use planning process, then the water resource would be seriously underrepresented.

Our conclusion is that the Water Board offers an approach to water planning that is more consistent with the approach to be followed in the new land use planning process. The Board, itself, includes regional members as well as federal ones and in this

respect is like the proposed Land Use Planning Commission. Its hearing process can ensure that regional and community voices are heard. Also, because the Board is, by statute, charged with deciding water quality as well as allocation issues, it will be the body that ultimately implements land use plans insofar as they affect the water resource.

Finally, it is federal policy to gradually transfer authority over natural resources to the Yukon Territorial Government. Because the Water board could easily be transformed into an agency of the territorial government, the water planning, allocation and quality regulation regimes could be handed over t the territorial government with minimum disruption when the federal policy becomes a reality.

Given this conclusion, the following section looks at ways of involving the Water Board in land use planning.

Methods of Involving the Water Board in Planning

Several options can be considered for involving the Yukon Water Board in the proposed land use planning process.

- Obviously, the Water Board could proceed on its own to discharge its regulatory and allocative mandate, ceding all planning responsibilities to the land use planning process. In carrying out its regulatory functions it would decide in each case the extent to which its decisions would adhere to plans established under the planning process. This option

would lead to little involvement in plan formulation and, as a result, little commitment on the part of the Water Board to such plans. The indifference that might be created at the regulatory level could result in plans being largely ineffective so far as water management is concerned.

- The Land Use Planning Commission could systematically invite the Board to comment on water related issues in the planning process. Responding to this invitation need not compromise the Board's quasi-judicial position provided that particular licence applications are not discussed in the planning process.

- Alternatively, the Land Use Planning Commission could ask the Water Board to hold public hearings to establish basic water management priorities and principles for any given planning region. The water management criteria so established could then be incorporated into the respective land use plans to the extent possible. This approach would lighten the workload of the Commission and its support staff while at the same time it would achieve coordination between land and water planning and regulation. Even if the commission did not invite the Board to hold such hearings, the Board could do so on its own initiative, and could then use the resulting information when asked to contribute to the land use planning process.

- As a fourth option, the Land Use Planning Commission and the Water Board could hold joint hearings so that land use and water use issues could be addressed together in one public forum. There are precedents for such joint hearings in other regulatory and planning arenas.[9] In this and the above two options, the Water Board could be perceived to be an auxiliary 'box' in the administrative framework tying into the overall planning structure in the manner shown in Figure 2.

- Planning regions could be identified on the basis of watersheds, or portions of watersheds, making water resources central to the planning effort. The Water Board has already identified water management areas throughout the territory, and these could provide a general guide for planning purposes.

- Finally, the Water Board's technical advisory committee could act to advise the Land Use Planning office on technical matters regarding water use planning, as well as be represented by senior members of the Water Resources Division in the Intergovernmental Liason Committee. These involvements would further encourage adherence to common goals and principles between land and water use planning.

Integrating Water Licensing and Planning

There are two significant factors to be considered in integrating planning and regulatory processes. First, common goals must be recognized and followed. For this purpose, it is desirable to have some means of linking the two processes at the operational level.

Second, all significant interests and values must be considered by both processes in order that the most beneficial 'options' may be recognized. In the context of water in the Yukon Territory, these interests can range from consumptive uses -- water supply, waste disposal, water entrainment or diversion for construction -- to such non-consumptive uses as hunting, trapping and fishing, water-based recreation and tourism, game outfitting, and preservation of habitat for wildlife species.

To serve this wide range of interests as well as to align the current water allocation and regulation regime with water planning within the land use planning process, a two-stage licensing system is suggested (Figure 3). First, an application, whether for consumptive or non-consumptive purposes, would be 'screened' by the Water Board to identify conflicting uses and to assess whether it would have significant impacts on potential future uses. In the case where such impacts are deemed to be minor, a licence, or more likely, a conditional licence, would be issued.

With most non-consumptive uses, parameters that are necessary to support that use are often unknown. For example, it is frequently difficult to determine the areal extent required, the periodic rates of flow and flooding heights permissible, and the oxygen content, sediment loads, and toxic contamination that can be tolerated if non-consumptive uses such as fishing, trapping or recreation are to be protected. To overcome this hurdle, a conditional licence for a non-consumptive use could grant relatively generous terms and conditions regarding area, water quality and non-interference with flow, but be subject to a time period for acquiring the data base necessary to define the terms and conditions of a final licence more strictly. For example, the operator of a fishing lodge on a Yukon lake (e.g. Wolf Lake) could be given a conservation use water licence for the waters of the lake on the condition that within three years the hydrologic and water quality data would be obtained to enable the licence to be amended to define more precise parameters of water flows, levels and quality.

Where major impacts of licensing a non-consumptive or consumptive use are perceived, the Water Board could exercise its power to recommend to the Minister that the land area in question be reserved from further disposition (NIWA, s. 27(1)) and that no water licences be issued until the area and water body have been the subject of thorough evaluation and planning (NIWA, s.27(2)). A period of time should be specified for planning to proceed. Once a satisfactory 'plan' has been developed the land reserve and licensing restrictions would be lifted, and the licence application would be accepted or rejected in conformity with the 'plan'.

Two distinct benefits arise from this scheme. First, it provides a means of integrating water interests within the land use planning process because the Water Board could refer the evaluation and planning of reserved areas to that process. In this way, the screening process carried out by the Water Board would assist in identifying priority planning areas. It could also help in identifying important water issues to be addressed in the planning for that area. At the same time, by instigating planning in this way, the Board could make an important contribution to the planning process without compromising its quasi-judicial status in allocation procedures.

Secondly, the scheme helps to overcome a fundamental bias within the current water licensing system. All uses for which applications have been made and licences or authorizations issued have been consumptive ones that entail some change to the natural state of water bodies. To date, no applications have been made that would require the maintenance of natural water flows and quality even though "conservation use" for "preserving, protecting or improving the existing or natural environment" is designated as a "use" in the NIWA Regulations. Presumably, preserving or protecting the existing environment is a goal of the terms and conditions imposed on licences and authorizations currently issued for consumptive uses. In this indirect approach, however, conservation is pursued only as an after-thought and never as the primary use under a licensing application. The consequence is that the licensing system displays an inadvertent bias towards industrial development, and does not equitably serve all the relevant interests in water resources.

In a region like the Yukon Territory, with its economic dependence on domestic consumption of fish and wildlife and on recreation and tourism, conservation uses of the water resource are especially significant. If the Water Board were presented with an application for a conservation use, one wonders how the Board would proceed. This scheme provides a method which would place conservation uses on a more equal footing with other water uses while, at the same time, providing a planning context so that the optimal mix of consumptive and conservation uses could be achieved.

Finally, under this proposed licensing system a water use application could be held in abeyance while planning proceeds but would have first chance to establish its conformity with the 'plan' once the planning process is completed. What this system gains is the opportunity to determine local, regional and national priorities through an open planning process before decisions are made that could compromise those priorities.

V. Intergovernmental and International Considerations

Intergovernmental

The only development projects likely to affect both the Yukon Territory and British Columbia are water diversion or storage projects related to hydroelectric power development on tributaries of the Yukon River. The nature of these projects and the planning considerations which they entail are examined in the companion study entitled An Assessment of Institutional Arrangements in the Yukon River Basin for Planning, Constructing and Operating Hydroelectric Power Facilities.

Should such development projects proceed, and should they be perceived as requiring intergovernmental arrangements for long term water management in the Yukon River Basin, two alternatives are available. As previously mentioned, a water management agreement involving the Government of Canada and the governments of the Yukon Territory and British Columbia could be negotiated and implemented under the provisions of the Canada Water Act. Alternatively, or possibly in addition to an agreement under the Canada Water Act, the three governments could agree to establish a joint water management board to regulate water sharing and water quality in the basin. Such a board, the Prairie Provinces Water Board, performs these functions with regard to the Saskatchewan-Nelson River Basin. The constitution of this Board and the agreement under which it operates are described in a recent paper entitled The Prairie Provinces Water Board as a Model for the Mackenzie Basin.[10]

It is quite possible that a major hydroelectric project would occur in the Mackenzie River Basin before one would begin in the Yukon watershed. A proposed Slave River hydroelectric project in the Province of Alberta near its boundary with the Northwest Territories has aroused concern about the absence of a legal regime in Canada that would balance upstream and downstream interests affected by such a project. In its report, the Mackenzie River Basin study team recommended as a first priority the need to establish an inter-governmental agreement whereby upstream and downstream interests would be protected through water sharing and regulation of stream flows and water quality.[11] The governments of the Northwest Territories and Alberta, and the Government of

Canada recognize the need for such an agreement at some time in the future, but in the meantime are dealing with each other on a step-by-step basis. An underlying reality is that, in the absence of a legal regime imposing obligations, it is seldom in the interests of the upstream jurisdiction to reach a long term agreement. The overall problem is examined in detail in Water Policy for Western Canada: The Issues of the Eighties.[12]

Should a Mackenzie River Basin agreement be reached, it would be a model for a similar Yukon River Basin agreement. To be effective, the planning regime established under such an agreement would have to recognize the water management and land use planning processes operating within British Columbia and the Yukon Territory.

International

The international obligations of Canada and the United States could, at some future time, require coordinated planning efforts between the two countries in order to protect salmon stocks, navigation rights or water flows. Past experience suggests that, should an issue arise of serious proportions, the two countries would give the International Joint Commission terms of reference enabling it to undertake necessary planning and to make recommendations resolving the issues.

VI. Conclusions

It cannot be over emphasized that social and cultural progress as well as economic development in the Yukon Territory are intimately connected with its water resources. Land use planning in the Yukon does not just include water; in major respects it is water use planning. Certainly, preservation of water flows and water quality are crucial to the native population, to the recreation and tourism industry, and to the health and welfare of communities. Water is also needed for the process requirements of industry, and mining is potentially the Yukon's largest employer and largest generator of resource wealth.

Reconciling these water use and conservation demands will require sophisticated management if benefits are to be optimized for present and future Yukoners and for all Canadians. Integrating water use planning and management into land use planning processes is deserving of the highest priority among the concerns that confront the territorial and federal governments in these days of fast-changing goals and institutions. We believe we have indicated some major steps that can be taken to achieve such integration.

FOOTNOTES

1. The Yukon River Basin Study was established by an agreement dated November 24, 1980 between the Government of Canada, the Government of British Columbia and the Government of the Yukon Territory. It is scheduled to report to the governments in 1984.

2. Richardson, N.H. 1982. Land use planning, regional planning and environmental assessment: a preliminary review of issues. Prepared for the Beaufort Sea Environmental Assessment Panel. 15 p.

3. Task force on Beaufort Sea Developments. 1981. Report of the Task Force on Beaufort Sea Developments. Submitted to the Senior Policy Committee, Northern Development Projects, Government of Canada. 34p + appendices.

4. Government of Yukon. 1982. Land -- a Yukon Resource; a land use policy. 10 p.

5. Munro, J. (Minister of DIAND). 1982. Letter to C. Pearson (Leader of Yukon government).

6. Council of Yukon Indians. 1982. Land Use Planning, Environmental Assessment and Land Ownership in Yukon. A discussion paper. 12p.

7. There was a general view that the "use" must be both for an unincorporated municipal or engineering purpose and either for less than 270 days or for less than 50,000 gallons per day, but a literal reading of the regulation indicates that all these requirements were alternatives.

8. The advantage to acquiring an authorization rather than a licence was that it avoided the more rigorous, somewhat lengthy hearing and review process that licensing necessitates. However, it was argued that the types of uses contemplated in the Act that could be authorized without a licence were uses that required only small amounts of water on a short-term basis. But placer miners, for example, who often use large quantities of water, typically operated under authorizations, renewing them on a yearly basis because, due to the seasonable nature of their activities, they met the 270 day/year time limit. It was also argued that, under s.26(g) of the Act, only the Governor-in-Council could issue authorizations, and that allowing the Controller to grant authorizations was a sub-delegation of authority that was not provided for specifically in the Act.

This position was upheld in The Dene Nation v. The Queen (Federal Court of Canada, Feb. 14, 1984, not yet reported), with the consequence that the authorization system has been discontinued. Instead, under a new regulation (s.11, NIWA Regulations), certain categories of water use (municipal use by an unincorporated settlement or a construction camp, water engineering uses or uses not exceeding 50,000 gallons per day) are exempted from licensing requirements. This is said to be a temporary measure. Amendments to the NIWA are in the drafting stage to be submitted to Parliament on an expedited basis so as to provide a more comprehensive regulatory system.

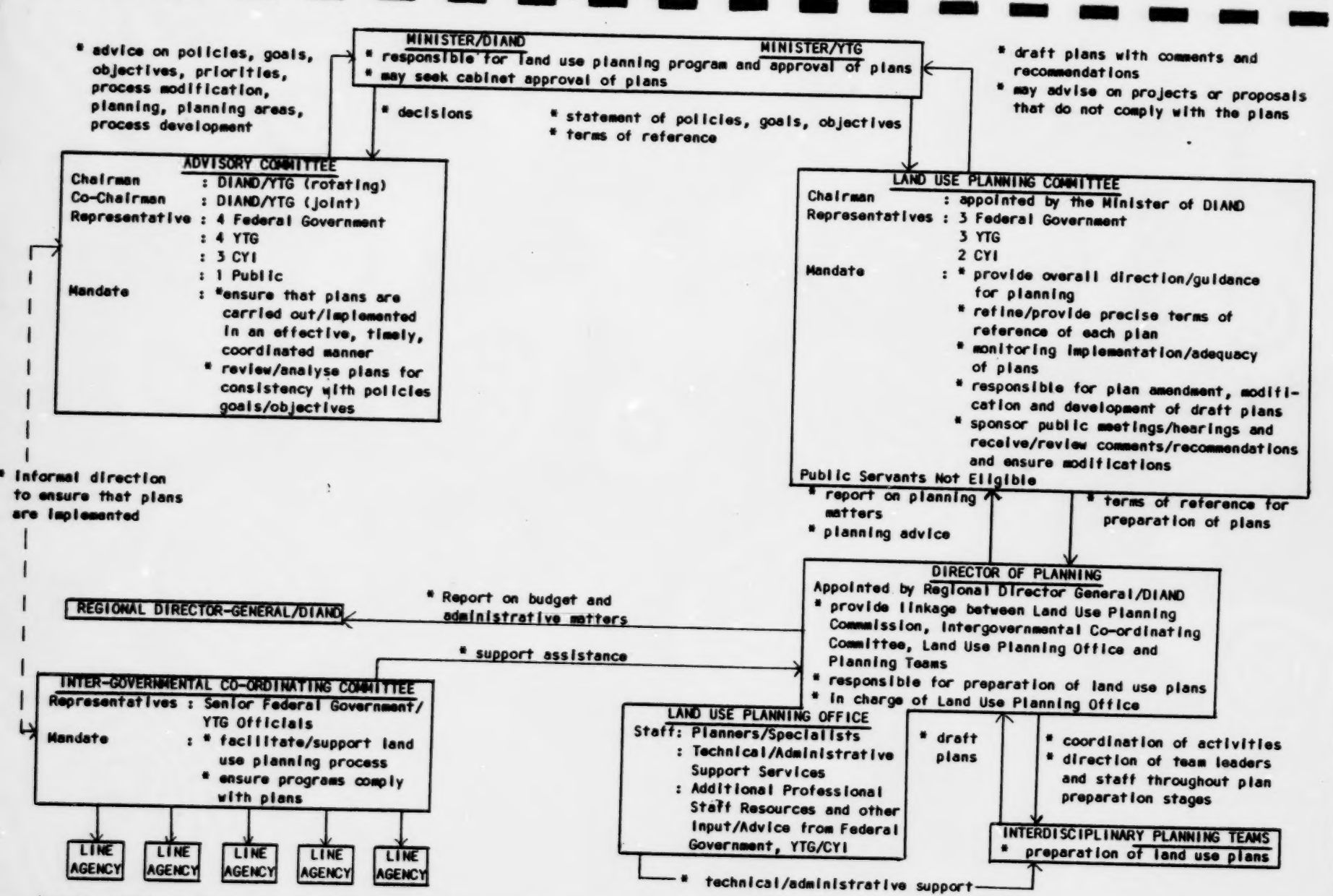
9. The Alberta Energy Conservation Board and the Utilities Board sit together to deal with natural gas issues. The Federal Environmental Assessment and Review Office (FEARO) and Alberta Environment are considering some joint hearings regarding the Slave River Hydroelectric proposal; also FEARO has an agreement with the B.C. Ministry of Environment to conduct joint hearings on the question of resuming offshore petroleum exploration in west coast waters.

10. This paper was prepared for the Banff Centre School of Management Workshop on Water Policy for Western Canada: Agenda for Action, May 26-29, 1983 and is to be published as part of the proceedings of the workshop.

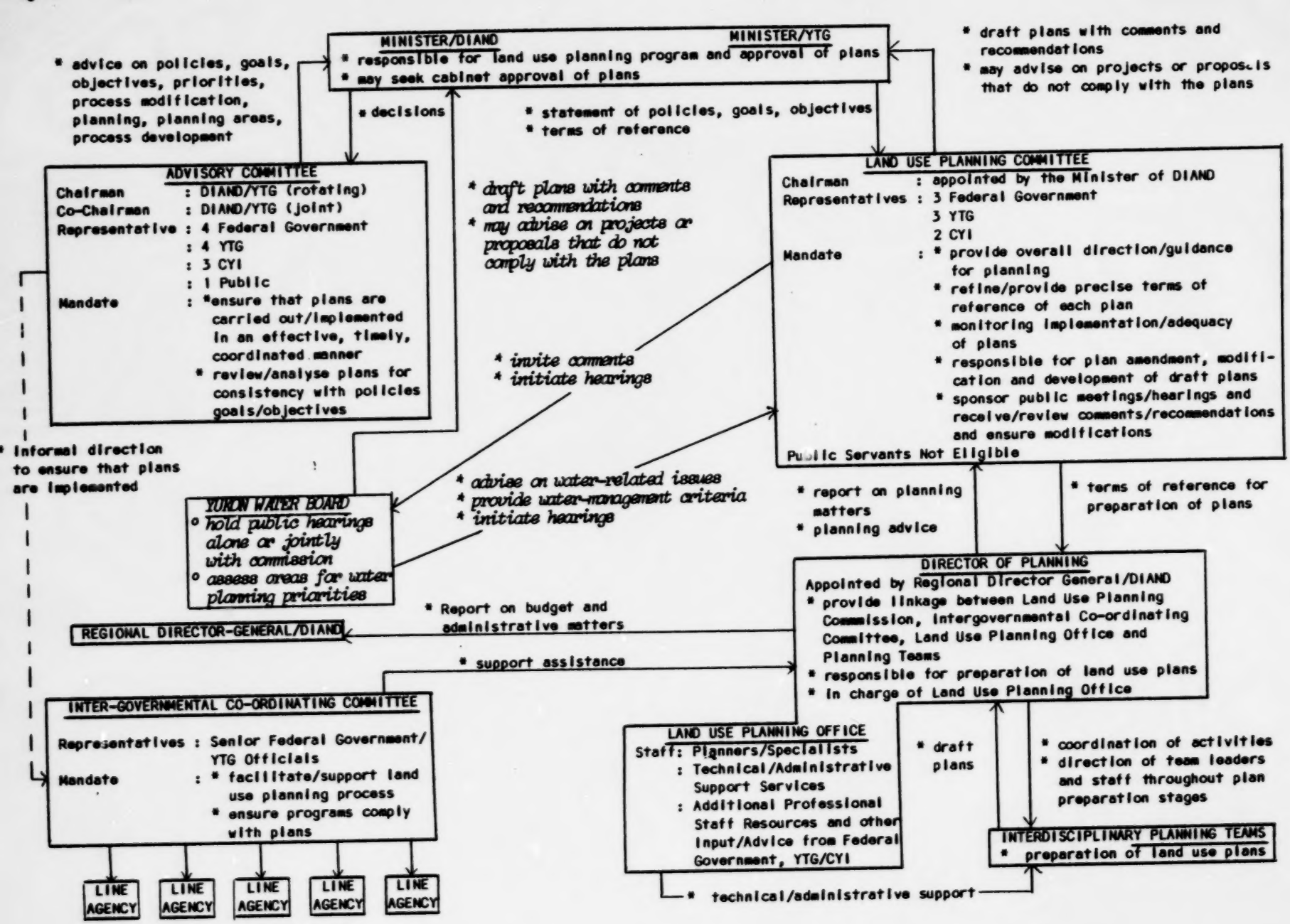
11. Mackenzie River Basin Study Report, 1981.

12. Proceedings of the Second Annual National Resource Conference, Banff Centre School of Management, September 9-12, 1982; published by University of Calgary Press, 1982.

Figure 1. Proposed administrative structure for land use planning in the Yukon


MINISTER/DIAND
* responsible for land use planning program and approval of plans
MINISTER/YTG
* may seek cabinet approval of plans
* advice on policies, goals, objectives, priorities, process modification, planning, planning areas, process development
* decisions
* statement of policies, goals, objectives
* terms of reference
* draft plans with comments and recommendations
* may advise on projects or proposals that do not comply with the plans
ADVISORY COMMITTEE
Chairman : DIAND/YTG (rotating)
Co-Chairman : DIAND/YTG (joint)
Representative : 4 Federal Government
: 4 YTG
: 3 CYI
: 1 Public
Mandate : *ensure that plans are carried out/implemented in an effective, timely, coordinated manner
* review/analyse plans for consistency with policies goals/objectives
LAND USE PLANNING COMMITTEE
Chairman : appointed by the Minister of DIAND
Representatives : 3 Federal Government
3 YTG
2 CYI
Mandate : * provide overall direction/guidance for planning
* refine/provide precise terms of reference of each plan
* monitoring implementation/adequacy of plans
* responsible for plan amendment, modification and development of draft plans
* sponsor public meetings/hearings and receive/review comments/recommendations and ensure modifications
Public Servants Not Eligible
* Informal direction to ensure that plans are implemented
* report on planning matters
* planning advice
* terms of reference for preparation of plans
DIRECTOR OF PLANNING
Appointed by Regional Director General/DIAND
* provide linkage between Land Use Planning Commission, Intergovernmental Co-ordinating Committee, Land Use Planning Office and Planning Teams
* responsible for preparation of land use plans
* in charge of Land Use Planning Office
REGIONAL DIRECTOR-GENERAL/DIAND
* Report on budget and administrative matters
* support assistance
INTER-GOVERNMENTAL CO-ORDINATING COMMITTEE
Representatives : Senior Federal Government/ YTG Officials
Mandate : * facilitate/support land use planning process
* ensure programs comply with plans
LINE AGENCY
LINE AGENCY
LINE AGENCY
LINE AGENCY
LINE AGENCY
LAND USE PLANNING OFFICE
Staff: Planners/Specialists
: Technical/Administrative Support Services
: Additional Professional Staff Resources and other input/Advice from Federal Government, YTG/CYI
* draft plans
* coordination of activities
* direction of team leaders and staff throughout plan preparation stages
INTERDISCIPLINARY PLANNING TEAMS
* preparation of land use plans
* technical/administrative support

Source: Based on "Agreement on Land Use Planning - Yukon Territory," September 9, 1983.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YUKON WATER BOARD
o hold public hearings alone or jointly with commission
o assess areas for water planning priorities
* advise on water-related issues
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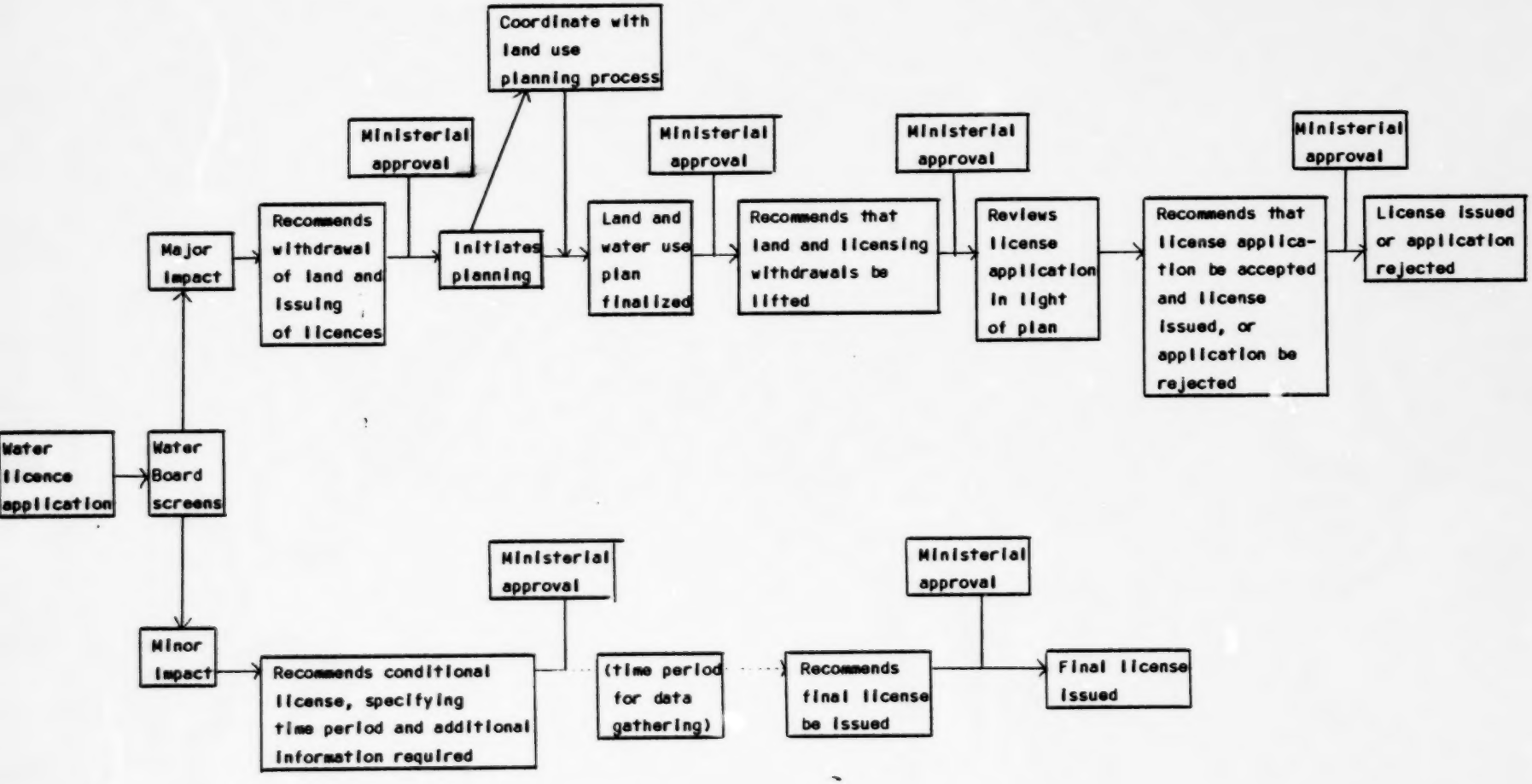
* direction of team leaders and staff throughout plan preparation stages
INTERDISCIPLINARY PLANNING TEAMS
* preparation of land use plans
* technical/administrative support
LINE AGENCY
LINE AGENCY
LINE AGENCY
LINE AGENCY
LINE AGENCY

Source: Based on "Agreement on Land Use Planning - Yukon Territory," September 9, 1983.

Figure 3. Proposed water licensing scheme - actions of the Water Board


Coordinate with land use planning process
Ministerial approval
Ministerial approval
Ministerial approval
Ministerial approval
Major impact
Recommends withdrawal of land and issuing of licences
Initiates planning
Land and water use plan finalized
Recommends that land and licensing withdrawals be lifted
Reviews license application in light of plan
Recommends that license application be accepted and license issued, or application be rejected
License issued or application rejected
Water licence application
Water Board screens
Ministerial approval
Ministerial approval
Minor impact
Recommends conditional license, specifying time period and additional information required
(time period for data gathering)
Recommends final license be issued
Final license issued

Source: H. Rueggeberg, 1983.

TABLE OF STATUTES

Federal

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Fisheries Act, R.S.C. 1970, c. F-14.

Navigable Waters Protection Act, R.S.C. 1970, c. N-19.

Northern Inland Waters Act, R.S.C. 1970 (1st Supp.), c. 28.

Territorial Lands Act, R.S.C. 1970, c. T-6.

British Columbia

Environment Management Act, S.B.C. 1981, c. 14.

Waste Management Act, S.B.C. 1982, c. 41.

Water Act, R.S.B.C. 1979, c. 429.

Yukon Territory

Land Planning and Development Act, S.Y.T. 1982, c. 22.

Wildlife Ordinance, Y.T.O. 1981, (2nd), c. 16.